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BEFORE THE POSTAL REGULATORY COMMISSION WASHINGTON, D.C. 20268-0001

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1

REPLY BRIEF

In its Initial Brief, the Postal Service has abruptly and with scant explanation proposed that Address Management Services be classified as a new "postal product." *Id.* at 92-26. While there may be merit to this proposal, the Association for Postal Commerce, Alliance of Nonprofit Mailers, Direct Marketing Association, Magazine Publishers Association, National Postal Policy Council and Parcel Shippers Association ("PostCom et. al.") submit this Reply Brief (1) to show that this is neither the right proceeding nor the right stage of any proceeding within which to effect a major and very poorly described change in the regulatory status of the databases and services that comprise Address Management Services, and (2) to identify the issues that the Postal Service's submissions and marked change in position leave unanswered – issues that can and should be addressed in an appropriate proceeding.

For the reasons detailed more fully below, we urge the Commission to: (a) reject the Postal Service's proposed classification of Address Management Services; (b) grandfather the services as a market dominant non-postal service; and (c) make clear that the Postal Service, if it wishes to pursue its belated but potentially meritorious

classification of Address Management Services as a new postal product, is free to do so pursuant to the applicable provisions of the Postal Accountability and Enhancement Act ("PAEA"), 39 U.S.C. § 3642, and the Commission's Rules governing the introduction of new postal products.

While Reclassification of Address Management Services May Have Merit, This is Not the Right Proceeding Nor the Right Stage of Any Proceeding in Which to Make Such a Determination

In its Initial Brief, the Postal Service has formally proposed for the first time to subdivide Address Management Services into two subsets, one called Address Quality and Support and the other designated as Move Update, the latter of which "includes" NCOA Link, as well as certain other methods of meeting the DMM rules governing Move Update. Initial Brief at 92. The Postal Service asserts that all of the Address Quality and Support Services should be designated as market dominant postal products and proposes that certain of the programs that support Move Update also be designated as market dominant postal products while three programs would be added to the competitive postal product list. Initial Brief at 92-96.

The Commission should decline to consider these proposals now. Whatever their merits, the Postal Service has neither made the necessary showing to the Commission nor provided the necessary notice to other parties to support classification of Address Management Services as postal (rather than nonpostal) services. Until the Postal Service takes these necessary steps, consideration of the classification proposals is premature.

It cannot be doubted that these proposals represent a substantial – and indeed dramatic – expansion of the scope of this proceeding, as well as a shift in the Postal Service's position from its submission earlier in this proceeding. The Commission's December 2007 order instituting this proceeding in characterized its purpose as solely a "review" of "each nonpostal service offered by the Postal Service . . . to determine which nonpostal services should continue" and, "for any nonpostal service that it concludes should continue," to categorize the service as market dominant, competitive or experimental. Order No. 50, 72 Fed. Reg. 73909 (Dec. 28, 2007). Nothing in Order No. 50 suggested that the Commission intended to consider in this docket the classification of any existing nonpostal services as *postal* services.

Consistent with Order No. 50, the relief sought by the Postal Service (in its March 19 Notice Of Submission Of Sworn Statement On "Nonpostal Services" Pursuant To 39 U.S.C. § 404(e)) was simply a Commission determination that the nonpostal services currently offered by the Postal Service should continue. While the Postal Service stated that "a number of Address Management Services . . . fall comfortably within the definition of 'postal service'" and "the Postal Service will take the appropriate actions, in the near future, to add them to the MCS," id. at 7 (emphasis added), the Postal Service did not ask the Commission to classify Address Management Services as postal services in this docket.

The Postal Service's subsequent filings, similarly, gave no indication that it intended to seek re-classification of these products *in this docket*. The Postal Service's April 1 "Response To Motion Of The Public Representative To Compel Filing Of Complete List Of Nonpostal Services" listed Address Management Services in a category of "offerings" that were "treated as 'nonpostal' in the past, but which the Postal Service *in the future* wishes to add to the MCS and treat as 'postal services." *Id.* at 2 (emphasis added) (citing *id.*, Attachment I).

Similarly, the Initial Response of the USPS to Order No. 74, filed on June 9, 2008, merely listed "Address Quality and Support" and "Move Update" services as services that "generate[] revenue and [are] not currently classified as a postal service," *id.* at 32-34. The Initial Response again did not suggest that these services should be classified as postal services in this docket. Likewise, the June 23 statement of Alice VanGorder, while offering evidence that Address Quality and Support and Move Update services are valuable, made no attempt to show that they should be classified as postal services. VanGorder Statement at 5-8. The only conclusion that could be drawn from these submissions is that the Postal Service would request classification of those services *in the future* under the appropriate procedures for classification of new postal products. *See* 39 U.S.C. § 3642; 39 CFR Section 3020.30 et seq.

Accordingly, the Postal Service's proposal to classify "Address Qualify and Support" and certain "Move Update" services as postal services in this docket did not

surface publicly until the Postal Service's September 10 initial brief—after the close of the record. USPS Initial Brief at 91-97.

Under these circumstances, the Postal Service's belated request for the classification of products that for decades have been treated as non-postal—and have been denominated as non-postal by the Postal Service itself in this docket—lies outside the scope of this proceeding. Nothing in the Commission's Order initiating the proceeding or in any of its subsequent rulings would have put a reasonable person on notice that the Commission was contemplating in this docket a classification proposal of the type the Postal Service that has now advanced in its Initial Brief. Because the classification of Address Management Services as postal services is neither within the scope of the Commission's proposal in this docket nor a logical outgrowth of that proposal, adoption of such a proposal on the current record would be a clear violation of the Administrative Procedure Act, 5 U.S.C. § 553(b). See, e.g., Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059, 1072-76 (N.D. Cal. 2007); Public Citizen, Inc. v. Mineta, 427 F.Supp.2d 7, 14-17, judgment amended on other grounds, 444 F.Supp.2d 12 (D.D.C. 2006), aff'd, Public Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810 (D.C. Cir. 2008); Shell Oil Co. v. EPA, 950 F.2d 741, 746-747, 750-752 (D.C. Cir. 1991); U.S. Steel Corp. v. EPA, 595 F.2d 207, 212-13 (5th Cir. 1979) (remanding for reconsideration designations made by the EPA due to the EPA's failure to give notice and receive prepromulgation comments from interested parties before declaring the designations). Furthermore, the absence of notice from the

Commission that the classification of specific products as postal services would be within the scope of this proceeding is a limitation that cannot be cured in any event by the Postal Service's filings: "Under the standards of the APA, 'notice necessarily must come—if at all—from the Agency." *Shell Oil*, 950 F.2d at 751.

Moreover, even if (contrary to fact) this proceeding could be said to reasonably embrace the conversion of non-postal products as the Postal Service has now proposed, such a proposal cannot be countenanced when it is advanced – for the first time – in an Initial Brief, after the close of the evidentiary record. *Newsweek, Inc. v. USPS*, 663 F.2d 1186, 1205 (2nd Cir. 1981); *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 428-430 (D.C. Cir. 1993).

Therefore, this is not the correct proceeding, nor is it the correct stage of any proceeding, in which the Commission can lawfully consider the major change in the regulatory status of Address Management Services. That conclusion, however, does not bring an end to this matter. There may well be merit to the Postal Service's views that these programs and databases should be treated as postal services. We do not question for a moment the Postal Service's claim that Change of Address and Undeliverable as Addressed mail presents challenges, not just for the Postal Service, but also for mailers and mail service providers. There is equally no question that address quality programs and support functions are intimately connected to the "core postal mission of moving the mail." Postal Service Initial Brief at 95. The Postal Service also is correct that the definition of postal services under the PAEA is

somewhat broader than it was under the Postal Reorganization Act. Specifically, the term 'postal services' refers to the "delivery of letters, printed matter, or mailable packages ... or other functions ancillary thereto." 39 U.S.C. § 101; emphasis supplied. There may well be a basis for concluding that the programs indentified by the Postal Service under the label Address Management are sufficiently ancillary to the delivery of mail to support the legal and policy conclusion that they should be treated as a postal product or products. See Initial Brief of PostCom, et al. at 14 fn. 3.

As we detail in the next section of this brief, the PAEA and the Commission's rules provide a venue through which the Postal Service can pursue its newfound approach to the regulation of Address Management Service, and can do so in a manner which affords interested parties the opportunity to understand and respond to the proposal and provides the basis for a reasoned Commission decision.

If the Postal Service Wishes to Treat Address Management Services As A New Postal Product, It Must Follow the Procedures Set Forth in the PAEA Applicable to Such Offerings. The Postal Service Has Failed to Address the Key Issues Required By These Procedures

As we have shown in our Initial Brief, the PAEA does not allow the simple "conversion" of non-postal products into postal products. Initial Brief of PostCom et. al. at 4-5. However, the Act and the Commission's rules establish a clear path by which a new postal product can be created and offered. Section 3642 of the PAEA provides, in relevant part, that

[u]pon request of the Postal Service ... the Postal Regulatory Commission may change the list of market-dominant products ... by adding *new products* to the list 39 U.S.C. § 3642(a). The Commission's rules spell out with particularity the procedure which the Postal Service is to follow if it wishes to introduce a new postal product. *See* 39 CFR § 3020.30 et seq.¹

In its Initial Brief, the Postal Service alludes to Section 3642. It does not claim that it has provided information under the new product rule adequate for the Commission to make in this proceeding the determinations required by Section 3642, even assuming that the proceeding reasonably embraced the proposal that has now been advanced. In fact, no such claim can be made. The Commission's rules spell out unambiguously and in considerable detail the type of information that must be submitted before the Commission can or will consider the introduction of a new postal product. Among other things, the Postal Service is required to provide "all supporting justification" upon which it proposes to rely. § 3020.31(e). To the extent that the Postal Service's Initial Brief in this proceeding is intended to provide that justification, it passes from the "tolerably terse" to the "intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

¹ The Commission's rules and the statute concededly contemplate that the Commission may "upon its own initiative" commence proceedings to add a new product to the mail classification schedule. We strongly urge, however, that the Commission refrain from exercising that authority in this situation. For whatever else has emerged in this proceeding with respect to Address Management Services, it is reasonably clear that the Postal Service's thinking about the subject has considerably evolved and it is uniquely in possession of the information which the Commission will need to reach a reasoned conclusion. Given the basic purposes of the PAEA, the Postal Service should be afforded the flexibility it needs to decide whether to proceed with a request for a new product encompassing Address Management Services and if so, how it wishes to present that request.

Foremost among the host of issues that the Commission and interested parties² would be required to address in a properly framed request for a new, posted product are these:

First, what are costs incurred by the Postal Service incurred in the offering of Address Management programs and how do these costs reasonably relate to the benefits realized by the Postal Service? In its Initial Brief, the Postal Service asserts that the "prices" for the suite of programs that will support Move Update "are set to recover the administrative costs for this service." Initial Brief at 96. No such statement is made with respect to Address Quality and Support offerings. What does this imply? What are the "administrative costs" to which the Postal Service refers? Further, the net benefit to the Postal Service for mailer's voluntary or involuntary use of either or both of the Address Management subsets is reflected in reduced costs to the Postal Service; how (if at all) are these avoided administrative costs (as opposed to processing costs) reflected in the "discounted rates approved by the Commission?" Initial Brief at 93.

Second, how are these new products to be offered? Historically and at present, the services are provided under a licensing system under which the data is compiled by the Postal Service, but the programs created by the Postal Service are actually provided by private sector entities. The NCOA link system is available only through companies licensed by the Postal Service. The Postal Service offers three types of licenses: (1) a "Full Service License" that provides a 48-month COA database with weekly updates;

² We note that the introduction of a new product requires that there be a specific period for "public comment." § 3020.33 and, in appropriate circumstances, a "period of discovery" and potentially "a hearing on the record." § 3020.35.

(2) a "Limited Service License" that provides an 18-month COA database with weekly updates; or (3) an "End User License" that provides an 18-month COA database with monthly updates. Users pay different fees for each type of license.

As a result, there are no published rates and the license fees are not always paid directly to the Postal Service by the mail user. While the Postal Service states that it "intends to file proposed MCS language" for these newly denominated postal services "shortly" (Initial Brief at 91, fn. 181), without the MCS language, we have no means of understanding what this new product will look like in contrast to its existing structure, an arrangement that has worked well for both the Postal Service and the industry.

Further, the Postal Service states that it does not want to continue to treat

Address Management Services as a non-postal product because that designation "raises issues about whether the Postal Services can offer *new activities*." Initial Brief at

91(emphasis supplied). The Commission cannot determine whether, as a new postal product, Address Management Services conform with the policies of the PAEA without a clear understanding of what these "new activities" mean and how they affect the existing structure and price terms of the two subsets of Address Management Services.

<u>Third</u>, what is the competitive impact of the proposed reclassification upon mailers, mail service providers and, particularly, licensees in the private sector that actually offer to mailers the NCOA type services? The Postal Service requests that

³ This is, notably, a tacit concession that the reclassification of Address Management Services is indeed subject to Section 3642.

three programs be added to the competitive product list on grounds that "[e]ach service competes with similar products offered by other vendors, or vendors have the ability to offer a similar product." Initial Brief at 97. Although the Postal Service has, quite properly, applied the tests embedded in Section 3642(b),⁴ it provides no support for the conclusion that the three programs are, in fact, offered by other vendors or by vendors with ability to offer a "similar product." Indeed, other vendors can only efficiently provide these programs if they license the underlying data from the Postal Service.

This means that the Postal Service does not, in fact, compete with other vendors, except downstream, which it still indirectly controls.

The Postal Service's brief also ignores more basic competitive concerns.

Although it proposes to treat Move Update as well as NCOA link as a postal product, it ignores the fact that Move Update is not a product or a service: it is a requirement.

NCOA Link, now embraced in the Move Update subset, is one of several limited methods specified in the DMM pursuant to which mailers can comply with the mandatory and revised Move Update Standards that become effective on November 23, 2008. Depending upon how the Address Management Services – as postal products – are structured and priced and depending on how they are treated in terms of the Private Express Statutes (see § 3020.32(e)) there is a serious potential for the Postal Service to abuse its market power to the detriment of mail service providers and mailers alike.

The Supreme Court has long recognized that:

⁴ Again, this tacitly concedes the application of that section to this proposal.

"the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred elsewhere to purchase on different terms." *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 12 (1984).

By making Move Update mandatory for the two major classes of mail, the Postal Service has, in essence, created a tying product. While that, in itself, may be perfectly lawful and sound as matter of public policy, the Postal Service cannot be permitted to use its market power to force mailers into the purchase of a postal product – e.g., NCOA Link – that the mailer "might have preferred to purchase elsewhere," – in the private sector as mailers do now – "on different terms."

There is thus a serious question as to whether all of these products, assuming that they are to be added to the Mail Classification Schedule, should be denominated as market dominant. More importantly, there can be no meaningful determination as to whether this new postal product comports with policies and purposes of the PAEA or is simply an artifice to permit the Postal Service to engage in monopoly abuse until these competitive questions have been addressed and resolved.

Fourth, how expansive is the Commission's jurisdiction over these new postal products? Clearly, although the Postal Service does not say so, the products would be included, in some fashion, in the Annual Compliance Report and the Annual Compliance Audit mandated by Sections 3652 and 3653 of the PAEA. It is not so clear, however, as to how the price cap would apply, if it does at all. By its terms, the price cap applies at the class level. 39 U.S.C. § 3622. And, while it appears that the

Postal Service contemplates that Address Management Services would be capped (Initial Brief at 92), it is far less clear whether the Postal Service contemplates that each of the suites would be added as a product to each of the existing classes or whether all of the suites in each of the two subsets would be treated as a class, or whether, in fact, it is the Postal Service's position that there is no "class" within which these products fall.

Moreover, it is clear from the Postal Service's brief that it intends "to add activities" to these products. The Postal Service may be correct that there are sources of revenue that lie outside postal and non-postal services and that it is appropriate to distinguish between "services" on the one hand and activities relating to "property" on the other. Initial Brief at 43-49. Whatever the force of this argument, however, it is plainly inapplicable to Address Management Services. The Postal Service asserts broad claims to an exclusive property interest in the information that reposes in virtually all of these programs. As a result, there can be no meaningful separation of the "property" and the "service."

Finally, in the exercise of its claimed sovereignty over the database, the Postal Service has imposed a number of restrictions and conditions on the use of the database – some of which may be defensible, others of which are more permissive or more restrictive than federal law would otherwise permit or require. The Initial Brief gives no indication as to whether and, if so, to what extent, the classification of Address Management Services as a postal product gives the Commission jurisdiction to examine and, possibly, to require changes in, the non-price terms and conditions imposed by the

Postal Service through license. To the extent that the Postal Service's decision to convert these historically non-postal products into a postal service and to distinguish between "property" and "service" is meant to deny licensees and other affected parties the opportunity to seek review and relief from the non-price terms and restrictions of the licenses, the Postal Service's position is problematic. As we have shown in our Initial Brief, Congress plainly intended that there be a venue to seek review of actions the Postal Service may take with respect to non-postal services. Initial Brief of PostCom, et al. at 7-12. That conclusion is even more compelling in the case of postal products where the Commission has exclusive and plenary jurisdiction. The Postal Service cannot be permitted to undo the PAEA's clear command by converting part of a non-postal service into a postal product, but at the same time, insist that the non-price terms are unreviewable.

The undersigned parties are sympathetic to the economic pressures that the Postal Service currently faces, and its obvious desire to find additional revenue streams. But Title 39 authorizes a variety of means for the Postal Service to protect its financial interests. Moreover, most mailers are also under difficult economic pressures. The present circumstances cannot justify bypassing the statutory constraints on classification changes established by Congress less than two years ago.

Conclusion

The proposed movement of Address Management Services into the postal product category raises a myriad of concerns that must be further explored. To accept the Postal Service's proposal at this point is premature. The Commission should continue to treat Address Management Services as a non-postal product. To the extent the Postal Service wants to classify these services as postal products, it must follow the appropriate procedures, including allowing the Commission to review the proposal and associated pricing structure.

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